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IN THE

Supreme Court of the United States

KIMCO OF EVANSVILLE, INC.
N/K/A/ KCH ACQUISITION, INC.,
THE FRANKLIN LIFE INSURANCE COMPANY
AND VANDERBURGH COUNTY, INDIANA,

Petitioners,

v.

STATE OF INDIANA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Indiana

BRIEF IN OPPOSITION TO THE PETITION

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QUESTION PRESENTED

When the State condemns a strip of land as one part of a capital improvement project, does "just compensation" include all economic injuries owing to the *entire* project?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITION 6

I. Kimco Preserved No Federal Claims Below 6

II. This Case Presents Neither An Unsettled Question of Federal Law Nor a Lower-Court Conflict of Any Kind 9

A. Kimco cites no cases imputing all consequential injuries resulting from a capital improvement project to the value of a condemned parcel 10

B. The Indiana Supreme Court properly applied just compensation law 15

III. The Indiana Supreme Court's Opinion Was Not a Judicial Taking and the Court Did Not Act as the Fact-Finder 17

CONCLUSION 19

TABLE OF AUTHORITIES

CASES

Adams v. Robertson,
520 U.S. 83 (1997) 7, 8

Armstrong v. Hufty,
55 N.E. 443 (Ind. 1901) 8

Beck v. State,
268 N.E.2d 746 (Ind. 1971) 10

Bd. of Directors of Rotary Int'l v. Rotary Club of Duarte,
481 U.S. 537 (1987) 7, 8

Campbell v. United States,
266 U.S. 368 (1924) 11

Currie v. Waverly & N.Y. Bay R. Co.,
20 A. 56 (N.J. 1890) 13

Exxon Corp. v. Eagerton,
462 U.S. 176 (1983) 7, 8

Griffin v. State,
763 N.E.2d 450 (Ind. 2002) 8

Hughes v. Washington,
389 U.S. 290 (1967) 17

Keystone Bituminous Coal Ass'n v. DeBenedictis,
480 U.S. 470 (1987) 16, 17

CASES [CONT'D]

Lingle v. Chevron U.S.A., Inc.,
544 U.S. 528 (2005) 16

Loretto v. Teleprompter Manhattan CATV Corp.,
458 U.S. 419 (1982) 11

Olson v. United States,
292 U.S. 246 (1934) 14

Sharp v. United States,
191 U.S. 341 (1903) 13

State v. Ensley,
164 N.E.2d 342 (Ind. 1960) ..... *passim*

State v. Kimco of Evansville,
891 N.E.2d 50 (Ind. 2008) 4

Street v. New York,
394 U.S. 576 (1969) 8

United States v. 33.5 Acres of Land,
789 F.2d 1396 (9th Cir. 1986) 13, 14

United States v. 50 Acres of Land,
469 U.S. 24 (1984) 11

United States v. 101.88 Acres of Land,
616 F.2d 762 (5th Cir. 1980) 14

United States v. 158.24 Acres of Land,
515 F.2d 230 (5th Cir. 1975) 14

United States v. 760.807 Acres of Land,
731 F.2d 1443 (9th Cir.1984) 14

CASES [CONT'D]

United States v. Chicago, B. & Q. R. Co.,
90 F.2d 161 (7th Cir. 1937) 14

United States v. Grizzard,
219 U.S. 180 (1911) 12, 13

United States v. Miller,
317 U.S. 369 (1943) 13

W. Va. Pulp & Paper Co. v. United States,
200 F.2d 100 (4th Cir. 1952) 11

Webb v. Webb,
451 U.S. 493 (1981) 8

STATUTES

Ind. Code § 32-24-1-9(c) 7

RULES

Sup. Ct. R. 14.1(g)(i) 6

STATEMENT OF THE CASE

This case involves the proper valuation of a strip of land that Indiana condemned for use in a roadway improvement project. The Indiana Supreme Court held that the value of the condemned parcel does not include incidental and consequential losses from the entire project of which the condemnation was only one part. Kimco claims the valuation should include all lost commercial value of its strip-mall property owing to traffic-flow restrictions caused by the project, regardless whether those losses were proximately caused by the State's use of the condemned parcel. Kimco, however, has neither preserved a federal constitutional challenge nor demonstrated any lower court conflict or pressing national concern over this issue, so the Court should deny the Petition.

1. Plaza–East Shopping Center, which is owned by Kimco, sits at the intersection of the Lloyd Expressway and Green River Road in Evansville, Indiana. Pet. at 6. Plaza East has no ingress or egress onto the Lloyd Expressway, but does have two entrances on Green River Road. *Id.* Prior to the State's roadwork at issue here, Plaza East's southern entrance allowed drivers to enter and exit the shopping center from either direction. Pet. App. at A-47. The northern entrance was divided such that only northbound drivers could enter or exit the property. *Id.*

In 2000, the Indiana Department of Transportation concluded that it was necessary to improve Green River Road in order to reduce traffic

conflicts and delay times at the intersection with the Lloyd Expressway. Pet. App. at A-7. On June 23, 2000, the State of Indiana filed a Complaint for Appropriation of Real Estate against Kimco seeking to (1) condemn a 0.154 acre strip of the 14.339 acre Plaza East property, (2) obtain a construction easement of 0.048 acres until December 31, 2004, and (3) impose a permanent limit on Plaza East's ingress and egress. Pet. App. at A-28, A-29. The Complaint included a sketch of the real estate and the proposed improvements to it. Appendix of Appellant at 29, *State of Indiana v. Kimco of Evansville*, 881 N.E.2d 987 (Ind. Ct. App. 2007) (No. 82A01-0607-CV-301) ("Ct. App. App.").

With respect to the condemnation, the State proposed to acquire the 0.154 acre strip to construct a new lane for, and thereby widen, Green River Road, which would provide a better lane for cars exiting the Lloyd Expressway heading northbound on Green River Road. Pet. App. at A-7. The State's plan also called for reconfiguring the lanes and installing a raised median on Green River. *Id.* Following construction, there would still be two northbound and two southbound lanes, and the shopping center would retain both of its pre-existing entrances at the same width. *Id.* In fact, the State planned to remove the pre-existing divider in the northern entrance to the shopping center, allowing full ingress and egress from both directions. *Id.* The new median on Green River Road, however, would prevent southbound motorists from using the southern entrance to the shopping center. *Id.* And, to preserve the benefits of the roadway improvements, the State's plan also called for

precluding further alteration of Plaza East's entrances and exits. Pet. at 9-10.

After Kimco failed to appear to contest the Complaint, the trial court entered an Order of Appropriation and Appointment of Appraisers. Pet. App. at A-7 n.3. The court instructed the court-appointed appraisers to consider "the damages, if any, to the residue of Defendant's real estate caused by Plaintiff's appropriation" and noted that "loss of access is compensable, if there is no other reasonable access to the residue[.]" Ct. App. App. at 36, 37. Based on these instructions, the court-appointed appraisers determined the total value of the condemned property to be $95,300. Pet. App. at A-7 n.3. The State deposited the full amount of the appraisal into Kimco's account on January 11, 2001. Brief of Appellant at 1, *State of Indiana v. Kimco of Evansville*, 881 N.E.2d 987 (Ind. Ct. App. 2007) (No. 82A01-0607-CV-301). The State then proceeded to improve the road according to its filed plan.

2. In May 2001, however, Kimco decided that the valuation was insufficient and filed a motion to submit a delayed reply to the appraisers' report. The trial court permitted Kimco to file exceptions and to request a jury trial on valuation. Ct. App. App. at 48. The case went to trial in February 2006, well after construction was completed.

Kimco contended at trial that under Indiana law it was entitled to damages due to a "loss of access" because the new median and merge lane restricted access to the southern entrance resulting in traffic congestion at the northern entrance. Pet. App. at A-

7, A-8. The State objected to this theory, but the trial court permitted Kimco to present evidence relating to the alleged "loss of access" and instructed the jury that Kimco was entitled to recover for this alleged loss. Pet. App. at A-8, A-9. So instructed, the jury valued the condemnation at $2,300,000, and on March 13, 2006, the trial court entered judgment for that amount along with prejudgment interest of $896,859.82, for a total judgment of $3,196,859.82. Pet. App. at A-9 & n.4.

3. The State appealed, arguing that the trial court erred by considering Kimco's loss-of-access evidence. The Indiana Court of Appeals affirmed, concluding that the construction of a raised median and exit lane adjacent to Kimco's property took valuable property interests from Kimco. *See* Pet. App. at A-44. The Court of Appeals, citing only Indiana law, found that "Plaza East's loss of access is not based simply on the construction of the median but also, and importantly, on the reconfigured entrances on Kimco's property." *Id.*

The Indiana Supreme Court granted the State's petition for discretionary review and reversed. Pet. App. at A-10, A-23; *State v. Kimco of Evansville*, 891 N.E.2d 50 (Ind. 2008) (table decision). Kimco, again citing only Indiana law in its brief, insisted that a median can lead to a "substantial and material impairment" of access rights. Brief of Appellee at 39, *State v. Kimco of Evansville*, 902 N.E.2d 206 (Ind. 2009) (No. 82S01-0806-CV-308). The Indiana Supreme Court, however, disagreed and emphasized the distinction between the value of the condemned parcel and other alleged consequential harms. It

observed that the State did not eliminate any access points, but merely (1) constructed a median that reduced the utility of Kimco's preferred access point, (2) eliminated a barrier to improve two-way access at another (albeit non-preferred) access point, and (3) precluded the expansion of existing access points or the creation of new ones. Pet. App. at A-20, A-21. Accordingly, because unlimited rights of access are not compensable property rights, the Indiana Supreme Court refused to attribute Kimco's consequential losses to the condemnation, saying that "[n]either the construction of the median alone, nor the hypothetical conversion of Green River Road to a one-way street, would have constituted a compensable taking by the State." Pet. App. at A-23.

The court remanded the case to the trial court for re-determination of the proper amount of damages according to the proper rules. Pet. App. at A-24.

Kimco petitioned the Indiana Supreme Court for rehearing, arguing for the first time that "just compensation" for a taking under the Fifth Amendment requires courts to attribute consequential losses likely to follow from a capital improvement project to the value of property the government condemns as part of that project. The Indiana Supreme Court denied rehearing without opinion. Pet. App. at A-1.

REASONS FOR DENYING THE PETITION

When State and local governments undertake public works projects, they must pay for the land they condemn—including residual or severance losses caused by the condemnation—but they are not otherwise responsible for negative financial consequences that the project may create for surrounding property owners. This is a well-established principle, and Kimco has failed not only to preserve a Takings Clause challenge to it, but also to cite any cases that contravene it.

I. Kimco Preserved No Federal Claims Below

A petition for writ of certiorari to review a state-court judgment must include, in the statement of the case, "specification of the stage in the proceedings, both in the court of first instance and the appellate courts, when the federal questions sought to be reviewed were raised[.]" Sup. Ct. R. 14.1(g)(i). In Kimco's Petition, the only reference to a specific stage in the proceedings in which a federal question was raised occurs in the last paragraph of the Statement of the Case, where Kimco says that the "brief submitted on its motion for rehearing to the Indiana Supreme Court . . . raised objection to the decision on the ground of violation of the United States Constitution." Pet. at 12. There is no reference to any other stage in the proceeding where the federal question was presented to the state courts, including the "court of first instance."

Furthermore, the Court "will not consider a petitioner's federal claim unless it was either

addressed by, or properly presented to, the state court that rendered the decision" under review. *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (per curiam). The Indiana courts never decided the federal questions for which Kimco seeks review. Rather, the Indiana Supreme Court's decision was based entirely on state law, particularly a state statute, Ind. Code § 32-24-1-9(c), and the case of *State v. Ensley*, 164 N.E.2d 342 (Ind. 1960). Pet. App. at A-15. The Indiana Supreme Court did reference federal law at the outset of its decision, but only to establish that article I, section 21 of the Indiana Constitution is "textually indistinguishable" from the federal Takings Clause. Pet. App. at A-11. In fact, the court stated that it was probably because Kimco could not win under federal law that "Kimco presents its case in terms of Indiana case law." Pet. App. at A-12. The court then rendered its decision under Indiana law, and in particular stressed that current Indiana statutes governing compensation for condemned property are functionally the same as the statutes in effect in 1960, when *Ensley* was decided. Pet. App. at A-23, A-16.

If the highest state court does not address the federal question presented, there is a rebuttable presumption "that the issue was not properly presented." *Adams*, 520 U.S. at 86-87 (citing *Bd. of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987)); *see also Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983) ("when 'the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can

affirmatively show the contrary.'") (quoting *Street v. New York*, 394 U.S. 576, 582 (1969)). The petitioners have the burden of "showing that the issue was properly presented to that court," *Adams*, 520 U.S. at 86, and they must demonstrate "that the state court had 'a fair opportunity to address the federal question that is sought to be presented here[.]'" *Id.* at 87 (quoting *Webb v. Webb*, 451 U.S. 493, 501 (1981)).

Kimco cannot make this showing because it did not assert a federal theory until its petition for rehearing in the Indiana Supreme Court. Generally, the Court will not "consider issues raised clearly for the first time in a petition for rehearing when the state court is silent on the question." *Adams*, 520 U.S. at 89 n.3. In *Adams*, it was insufficient for petitioners to raise a federal due process claim in their state court petition for rehearing. *Id.* Similarly, in *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987), a First Amendment vagueness and overbreadth challenge to a state statute had not properly been presented to the state courts, even though it was raised in the petition for rehearing. *Id.* at 549-50. Furthermore, the Indiana Supreme Court itself does not consider issues raised for the first time in a petition for rehearing. *See Griffin v. State*, 763 N.E.2d 450 (Ind. 2002).("A petitioner may seek rehearing only on points raised in the original brief.") (citing *Armstrong v. Hufty*, 55 N.E. 443 (Ind. 1901)). Therefore, Kimco has not preserved its federal claim and the Petition should be denied.

II. This Case Presents Neither An Unsettled Question of Federal Law Nor a Lower-Court Conflict of Any Kind

Kimco argues that the Indiana Supreme Court erred by considering "regulatory takings or inverse condemnation cases as controlling Petitioner's partial condemnation case." Pet. at 14. Its theory appears to be that, when the State, having already condemned a nearby strip of land, built a median in the middle of Green River Road and changed the traffic pattern in front of the shopping center, it effectuated a taking of the shopping center's property insofar as it caused that property to lose value.

However, the State built the median exclusively on its pre-owned property—not on property of Kimco that the state condemned. The only property that the State took from Kimco was the 0.154-acre strip of land (and the construction easement). The State used that strip of land to widen Green River Road by adding a traffic lane on Kimco's side of the road. It just happened to install the median that allegedly causes Kimco's consequential losses during the same construction project. It is true that the State also extinguished Kimco's rights to expand existing access points or create new ones, but Kimco does not argue that such rights constitute compensable takings—it simply tries to tack resulting losses onto the value of the condemned parcel.

A. Kimco cites no cases imputing all consequential injuries resulting from a capital improvement project to the value of a condemned parcel

Kimco's theory is that eminent domain compensation should include all incidental and consequential injuries caused by a capital improvement project. To bolster its theory, Kimco frames the State's "taking" not simply as the condemnation of the 0.154-acre strip of land, but as also including a "permanent extinguishment of all rights and easements of ingress and egress to and from Green River Road." Pet. at 9-10. First, the Green River Road project has only prevented Kimco "from adding new entrances on Green River Road or widening its existing access points." Pet. App. at A-6. The State has not reduced the access driveways themselves—and in fact the State eliminated a barrier on the north drive to allow full ingress and egress both directions. Pet. App. at A-7.

Second, as long as some access to real property remains, affecting ingress and egress does not constitute a compensable taking: a "property owner is not entitled to unlimited access to abutting property at all points along the highway." Pet. App. at A-21 (quoting *Ensley*, 164 N.E.2d at 348); *see also Beck v. State*, 268 N.E.2d 746, 749 (Ind. 1971) (while "abutting property owners [do have] a right of ingress and egress from their property to the highway[,] . . . they were [not] entitled to free access at every foot along their road frontage."). The State does not take a private property interest when traffic is "made to travel a more circuitous route" in order

to get to a commercial property. *Ensley*, 164 N.E.2d at 350. Nor does Kimco argue to the contrary.

Moreover, Kimco cites no precedent for the proposition that government agencies must compensate surrounding property owners for any diminution of value that results from a capital improvement project. Indeed, the Court has flatly rejected this proposition. *See United States v. 50 Acres of Land*, 469 U.S. 24, 33 (1984) ("the Fifth Amendment does not require any award for consequential damages arising from a condemnation"); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 428 (1982) (stating that this Court has consistently found that "government action outside the owner's property that causes consequential damages within" is not a taking); *Campbell v. United States*, 266 U.S. 368, 371 (1924) ("The proposed use of the lands taken from others did not constitute a taking of his property."); *see also W. Va. Pulp & Paper Co. v. United States*, 200 F.2d 100, 104 (4th Cir. 1952) ("The rule is that, even where lands are contiguous, the owner is not ordinarily entitled to damages accruing to tracts which are separate and distinct from the lands taken.").

Kimco seems to argue, however, that this case is distinguishable because, in the course of undertaking its road improvement project, the state happened to condemn a strip of land. That condemnation, it argues, opens the door to compensation for *all* loss in property value owing to the project, including losses related to the construction of the new median combined with

extinguishing Kimco's (otherwise non-compensable) right to expand its entrances and exits or create new ones. Kimco argues that the State must pay "severance damages" according to the "before and after" rule, which requires evaluation of "all the factors and possibilities that would affect the price a willing buyer would offer to a willing seller for the property." Pet. at 16-19, 21-23.

It is one thing to demand payment for "residual" or "severance" damages caused by the *condemnation*. Here, the appraisers valued the parcel at $95,300, *including* "damages . . . to the residue of Defendant's real estate caused by Plaintiff's appropriation." Ct. App. App. at 36, 37. It is quite another thing, however, to say that "residual" or "severance" losses include losses owing to *other* aspects of a capital improvement project. In this regard, the Indiana Supreme Court held that, because "acts done in the proper exercise of governmental powers and not directly encroaching on private property, although their consequences may impair its use or value, do not constitute a 'taking[,]'" the "severance" damages that Kimco seeks necessarily could not include any effect from the installation of the median or extinguishment of non-compensable rights to expand ingress and egress. Pet. App. at A-16 (quoting *Ensley*, 164 N.E.2d at 346).

The Court's just compensation precedents—including those cited by Kimco—support the Indiana Supreme Court's holding. In *United States v. Grizzard*, 219 U.S. 180, 181-82 (1911), part of the owner's farm land had been flooded to improve navigation on a creek, resulting in an obvious taking

of the flooded land. The flooded portion also cut off access to a road and the Court found that the owner should be compensated for this loss of access. *Id.* at 183. The Court stated that "[w]henever there has been an actual physical taking of a part of a distinct tract of land, the compensation to be awarded includes not only the market value of that part of the tract appropriated, but the damage to the remainder resulting from *that taking*[.]" *Id.* (emphasis added). However, no compensation is owed simply because a capital improvement project injures surrounding landowners without condemning their property. *Id.* at 184; *see also United States v. Miller*, 317 U.S. 369, 376 (1943) ("As respect[s] other property of the owner consisting of separate tracts adjoining that affected by the taking, the Constitution has never been construed as requiring payment of consequential damages"); *Sharp v. United States*, 191 U.S. 341, 355 (1903) ("It is solely by virtue of his ownership of the tract invaded that the owner is entitled to incidental damages. His ownership of other lands is without legal significance.") (quoting *Currie* v. *Waverly & N.Y. Bay R. Co.*, 20 A. 56 (N.J. 1890)).

Here, Kimco's additional alleged "damage to the remainder" does not result from the taking itself, but from the new median and extinguished rights to improve access, so *Grizzard* does not support additional compensation. Indeed, awarding compensation based on these aspects of the larger project would thwart the corollary proposition from *Grizzard* that the government owes nothing for consequential losses that occur apart from the condemnation itself. *Cf. United States v. 33.5 Acres*

of Land, 789 F.2d 1396, 1398 (9th Cir. 1986) ("[T]he land-owner must demonstrate that the taking caused the severance damages.") (quoting *United States v. 760.807 Acres of Land*, 731 F.2d 1443, 1448 (9th Cir. 1984)).

In the other cases cited by Kimco, the government was responsible only for remainder losses owing to the use of the *taken* land. *See Olson v. United States*, 292 U.S. 246, 256 (1934) ("Just compensation includes all elements of value that inhere in the property . . . . But the value to be ascertained does not include, and the owner is not entitled to compensation for, any element resulting subsequently to or because of the taking."); *United States v. 101.88 Acres of Land*, 616 F.2d 762, 769 (5th Cir. 1980) (finding no jurisdiction to hear a claim for damages to land not taken); *United States v. 158.24 Acres of Land*, 515 F.2d 230, 232 (5th Cir. 1975) (declining to treat condemned land as a severable plot completely owned by the plaintiff); *United States v. Chicago, B. & Q. R. Co.*, 90 F.2d 161, 167 (7th Cir. 1937) (holding that just compensation includes "proximate damages to . . . remaining property occasioned by the construction and use" of the *taken* land).

Kimco thus advances a theory of just compensation that has never prevailed—that condemning a parcel of land in connection with a capital improvement project opens the door to compensation for all consequential injuries the property owner may suffer as a result of the project. Even Kimco's *amici* acknowledge that "most states do not generally compensate condemnees for the

decrease in value attributable to changes in access" and asks the Court to create a new rule in that regard. Amicus Brief at 1. Neither Kimco nor its *amici* present compelling reasons, such as a lower-court conflict, for the Court to address this theory.

B. The Indiana Supreme Court properly applied just compensation law

Kimco misinterprets the decision below when it argues that the court improperly applied regulatory takings analysis instead of "partial condemnation" analysis. Pet. at 14-15, 21, 23. Because limiting access to real property is not itself a "physical occupation" as long as some access remains, the Indiana Supreme Court properly considered each allegation of a taking—one physical and one essentially regulatory—separately.

1. As the Indiana Supreme Court held, the State's exercise of its eminent domain powers over the strip of land, and its construction easement of the parking lot, were obviously physical, per se takings. *See* Pet. App. at A-11. The State is required to compensate Kimco for them, and the original appraisal focused on ensuring just that. The appraisal included $67,000 for the land taken and $5,750 for the temporary right of way. Ct. App. App. at 50-51. The appraisers provided more than $20,000 of value to compensate Kimco for "severance damages" owing to the condemnation itself. *Id.*

2. As for the work on Green River Road, the State did not physically occupy Kimco's property either when it installed the new median or when it prevented Kimco from undertaking one particular

use of its land (*i.e.*, to create larger or additional access points). Further, these actions were not "attributable to the deprivation of [Kimco's] property right" over the condemned parcel. Pet. App. at A-20. Under longstanding precedent, "the appropriation of a strip of land from the commercial property and the simultaneous construction of a raised divider strip" are, for the purpose of takings analysis, "separate improvements." Pet. App. at A-23 (citing *Ensley*, 164 N.E.2d at 349).

Thus, the impact of the roadway improvement project as a whole on Kimco's property had to be analyzed separately from the value of the condemned strip. The larger project could be said to constitute a "taking" only if it deprived Kimco "of all or substantially all economic or productive use" of the shopping center property. Pet. App. at A-11 (quoting *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 538-40 (2005)). Yet the addition of the median and extinguishment of access-improvement rights, "if viewed separately from the taking of the 0.154 strip, plainly do not meet the *Lingle* test." Pet. App. at A-12. Kimco does not allege that any aspect of the Green River Road project has deprived it of "substantially all economic or productive use" of the Plaza East property. Pet. at 6-8. Accordingly, the Fifth Amendment does not require the State to pay Kimco's claimed $2,300,000 of lost value owing to the Green River Road project.[1]

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[1] Requiring the State to pay compensation for this lost value would undermine the "reciprocity of advantage" theory that limits regulatory takings claims. *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S.

III. The Indiana Supreme Court's Opinion Was Not a Judicial Taking and the Court Did Not Act as the Fact-Finder

In a last gasp effort to grab the Court's attention, Kimco argues that the Indiana Supreme Court's opinion constitutes a judicial taking. Pet. 26-27. If a claim for a judicial taking even exists, it is only in extraordinary cases such as when a decision "constitutes a sudden change in state law, unpredictable in terms of the relevant precedents[.]" *Hughes v. Washington*, 389 U.S. 290, 296 (1967) (Stewart, J., concurring). The Indiana Supreme Court, however, relied on *Ensley*, a case with remarkably similar facts decided in 1960. Pet. App. at A-5. The decision below occasioned no change in state law and was completely predictable from precedent.

Kimco also briefly argues that the Indiana Supreme Court improperly substituted itself in place of the jury as the finder of facts. Pet. at 27. Kimco's characterization is inaccurate—all the court did was overturn a verdict predicated on an erroneous understanding of the law. The jury was instructed that it could award damages for loss of access if Kimco "suffered a particular, private injury resulting

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470, 491 (1987) ("[w]hile each of us is burdened somewhat by the restrictions, we, in turn, benefit greatly from the restrictions that are placed on others."). The State's maintenance of safe and efficient roads and enforcement of traffic laws generally increases the value of Kimco's shopping center. Kimco does not pay a special tax when it benefits from road improvements, and it is not entitled to special compensation when it does not.

from a substantial and material interference with Kimco's rights of ingress and egress which are special and peculiar to this property and when no other reasonable means of access are available." Pet. App. at A-8, A-9. Because "physical takings and coincident roadway improvements are distinct actions, even if concurrent," however, the "loss of access" referred to in the instruction could not, as a matter of law, include losses resulting from "coincident road improvements." Pet. App. A-23. The jury was not so instructed, however, so its $2.3 million award was necessarily "excessive as a matter of law." Pet. App. at A-23.

Furthermore, the Court did not order the trial court to enter judgment on a particular value of the property; it merely remanded for further proceedings according to proper legal principles. Pet. App. at A-23, A-24. Accordingly, there was no improper finding of fact by the Indiana Supreme Court—only *de novo* review of the law.

Neither of these ancillary theories, therefore, is worth the Court's attention.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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